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IN THE

Supreme Court of the United States

October Term, 1940.

No. 792

RICHARD ARCHBOLD,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 793

ADRIAN ARCHBOLD,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 794

JOHN ARCHBOLD,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 795

ARCHBOLD van BEUREN,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.* — No. .

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Richard Archbold, Adrian Archbold, John Archbold and Archbold van Beuren (hereinafter col-

lectively referred to as the Petitioners), respectfully pray for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the above entitled cases to review orders entered December 18, 1940 (Richard Archbold case, R. 46; Adrian Archbold case, R. 44; John Archbold case, R. 42; Archbold van Beuren case, R. 46) by said Court affirming orders of the United States Board of Tax Appeals (hereinafter referred to as the Board) dated February 7, 1940 (Richard Archbold case, R. 30; Adrian Archbold case, R. 28; John Archbold case, R. 27; Archbold van Beuren case, R. 30), redetermining deficiencies in Petitioners' federal income taxes in various amounts for the year 1933.

SHORT AND SUMMARY STATEMENT OF THE MATTER INVOLVED.

The only question in each of these cases is the proper interpretation of Section 113 (a) (4) of the Revenue Act of 1932, which reads as follows:

> "Sec. 113. (a) Basis (unadjusted) of property.—The basis of property shall be the cost of such property; except that—
>
> "(4) Gift or transfer in trust before January 1, 1921.—If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in section 402 (e) of the Revenue Act of 1921, or in section 302 (f) of the Revenue Act of 1924 or the Revenue Act of 1926 (relating to property passing under power of appointment) regardless of the time of acquisition."

The property involved in these cases consisted of securities which were sold by the Petitioners in the year 1933

(Richard Archbold case, R. 15; Adrian Archbold case, R. 12-13; John Archbold case, R. 13; Archbold van Beuren case, R. 15). On the various dates when Petitioners arrived at the age of twenty-one (Richard Archbold case, R. 14; Adrian Archbold case, R. 12; John Archbold case, R. 12; Archbold van Beuren case, R. 14), the securities in question were received by the Petitioners from trustees under substantially identical trusts created by John D. Archbold, grandfather of the Petitioners (Richard Archbold case, R. 16-17; Adrian Archbold case, R. 13-14, 15; Archbold van Beuren case, R. 15, 16, 17), and by Annie M. Archbold, grandmother of Petitioners (Richard Archbold case, R. 19-21; Adrian Archbold case, R. 16-20; John Archbold case, R. 14-19; Archbold van Beuren case, R. 18-22), all prior to January 1, 1921.

Under each of the deeds of trust, the trustees were directed to expend the income for the benefit of the particular petitioner involved during his minority. The principal under each trust created by John D. Archbold was to be disposed of as follows:

> "On the arrival of the said Richard Achbold at the age of twenty-one years, the said trustees or the survivor of them shall transfer to him the said shares of stock, or the proceeds thereof, together with such accumulations as may accrue thereon up to that time.
>
> "In case said Richard Archbold does not live to the age of twenty-one years, then said trustees or the survivor of them shall transfer said shares of stock or proceeds thereof, together with such accumulations as may have accrued thereon, to the aforementioned May B. Archbold." (R. pp. 16, 17.)*

Disposition of the principal of each trust created by Annie M. Archbold was provided for in substantially the same language (R. p. 19).

*When a reference is made to "R" with no further designation the Record referred to is that in the case of Richard Archbold v. Commissioner.

The Petitioners contend that within the meaning of Section 113 (a) (4) of the Revenue Act of 1932, the securities which they sold in 1933 were acquired by them when they became entitled to receive them from the trustees upon their respectively attaining the age of twenty-one, and that prior thereto they had acquired no interest in said securities and hence the proper basis for gain or loss was the value of the securities on said date.

In this contention the Petitioners claim to be supported:

(1) By the decision of the Court in the case of *Helvering v. San Joaquin Co.*, 297 U. S. 496 (1936), wherein this Court pointed out the distinction between acquiring an interest in property and acquiring the property itself;

(2) By the long continued practice of the Bureau of Internal Revenue as evidenced by O. D. 1136, 5 C. B. (1921) p. 56, and G. C. M. 10260 XI-1 C. B. (1932) p. 79, in construing substantially identical language in earlier Revenue Acts as contended for by Petitioners, and by the fact that the Regulations of the Commissioner as approved by the Secretary of the Treasury have always provided that the basis for determining gain or loss under Section 113 (a) (4) of the Revenue Act of 1932 and its counterparts in prior Revenue Acts is the value at date of acquisition by the taxpayer;

(3) By the uniform construction placed by the Circuit Courts of Appeals upon the term "acquisition" as used in earlier Revenue Acts;

(4) By the decision of the Circuit Court of Appeals for the Fourth Circuit in *Reynolds v. Commissioner,* 114 F. (2d) 804, wherein that Court distinguished *Helvering v. Hallock,* 309 U. S. 106, and held that "where words are employed in one Act which had acquired a well known meaning in the law, they are to be given the same significance when used in a later statute;" and

(5) By the decisions of this Court rendered December 9, 1940, in *Helvering v. Janney, Taft v. Helvering* and *Helvering v. Oregon Mutual Life Insurance Company* which denied to the Commissioner of Internal Revenue the right to change by Regulations 86 well settled interpretations of various provisions of the Revenue Act of 1934.

The Respondent, on the other hand, contends that the proper basis for determining gain or loss was the basis in the hands of the trustees (Richard Archbold case, R. 15; Adrian Archbold case, R. 13; John Archbold case, R. 14; Archbold van Beuren case, R. 15).

The Board of Tax Appeals in an opinion promulgated December 22, 1939 (40 B. T. A. 1238), upheld the contention of the Respondent.

The Petitioners appealed their cases to the United States Circuit Court of Appeals for the Second Circuit. That Court affirmed the Board in a per curiam opinion (R. 43) solely on the authority of its prior opinion in the case of *Van Vranken v. Helvering,* 115 F. (2d) 709 (December 2, 1940), which was recognized to be in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Reynolds v. Commissioner, supra.*

JURISDICTION.

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. § 347) and § 1141 (a) of the Internal Revenue Code. The orders of the Circuit Court of Appeals for the Second Circuit to be reviewed were entered on December 18, 1940 (Richard Archbold case, R. 46; Adrian Archbold case, R. 44; John Archbold case, R. 42; Archbold van Beuren case, R. 46).

QUESTIONS PRESENTED.

The question presented is whether under Section 113 (a) (4) of the Revenue Act of 1932, the basis for the various securities sold by Petitioners during 1933 is their fair market value on the respective dates when the Petitioners actually arrived at the age of twenty-one, and first became entitled to receive that stock, or the basis in the hands of the trustees.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The holding of the Circuit Court of Appeals for the Second Circuit in the instant cases, which is based entirely upon the prior decision of that Court in the case of *Van Vranken v. Helvering, supra,* is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Reynolds v. Commissioner, supra,* certiorari granted February 10, 1941.

2. In holding that the Petitioners acquired their securities at the time when they were acquired by the trustees and hence the proper basis was the basis in the hands of the trustees, the Circuit Court of Appeals for the Second Circut decided a question important to the administration of the Internal Revenue laws, in conflict with applicable decisions in this Court in that

(a) it did not give sufficient weight to the distinction made in *Helvering v. San Joaquin Co.,* 297 U. S. 496 (1936), between the acquisition of an interest in the property and the acquisition of the property itself, and

(b) it declined to follow the fundamental rule that the reenactment of a statute incorporates preceding administrative and judicial interpretations, a rule reaffirmed by this Court as late as December 9, 1940, in the cases of *Helvering v. Janney, Taft v. Helvering,* and *Helvering v. Oregon Mutual Life Insurance Company* (61 S. Ct. 241, 244 and 207).

WHEREFORE, your Petitioners respectfully pray that Writs of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, sitting at New York, N. Y., commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the records of all proceedings had in these causes, to the end that these causes may be reviewed and determined by this Court; that the orders referred to at page 5 hereof be set aside and reversed, and that Petitioners be granted such other and further relief as may be just and proper.

Dated, February 26th, 1941.

RICHARD ARCHBOLD,
ADRIAN ARCHBOLD,
JOHN ARCHBOLD and
ARCHBOLD VAN BEUREN,

By WILLIAM R. SPOFFORD,
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Of Counsel.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the Board (Richard Archbold case, R. 25-30; Adrian Archbold case, R. 23-28; John Archbold case, R. 22-27; Archbold van Beuren case, R. 25-30) was promulgated Dec. 22, 1939 and is reported in 40 B. T. A. 1238. The *per curiam* opinion of the Circuit Court of Appeals, 115 F. (2) 1005, was rendered December 2, 1940, and appears at R. 43.

STATEMENT OF FACTS.

The pertinent facts are adequately stated in the foregoing petition at pages 2, 3, 4 thereof.

STATUTE INVOLVED.

The relevant provisions of the Revenue Act of 1932 are set forth in full in the petition on page 2 thereof.

SPECIFICATION OF ERRORS.

The errors which Petitioners will urge, if the writs of certiorari be granted, are that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding that these cases were ruled by the decision of this Court in the case of *Helvering v. Hallock*, 309 U. S. 106 (1940).

2. In determining that the securities which Petitioners sold in 1933, which they had received from trustees under trusts created by their grandparents prior to January 1, 1921, in which trusts petitioners had only contingent remainders which did not vest until they reached the age of twenty-one, were acquired by petitioners within the intendment of Section 113 (a) (4) of the Revenue Act of 1932, at the same time the securities were acquired by the trustees.

3. In holding that the proper basis for determining gain or loss upon the sales by Petitioners in 1933 of securities received by them under deeds of trust created by their grandparents prior to January 1, 1921, was the basis in the hands of the trustees.

4. In holding that the proper basis for determining gain or loss upon the sales by Petitioners in 1933 of securities received by them from the trustees under deeds of trust created by their grandparents prior to January 1, 1921, was not the value of the said securities when received by them upon their respective arrivals at the age of twenty-one.

5. In confirming the orders of the Board and in failing to reverse such orders.

ARGUMENT.

The Circuit Court of Appeals for the Second Circuit has rendered decisions in the instant cases in conflict with the Circuit Court of Appeals for the Fourth Circuit in *Reynolds v. Commissioner,* 114 F. (2d) 804, certiorari granted February 10, 1941.

After first having held that the taxpayer in the *Reynolds* case had only a contingent interest under the will of the testator, the Court in that case continued:

> "The inquiry in its final aspect is whether the date of acquisition shown by the legatee of a contingent remainder within the meaning of Section 113 (a) (5) of the Act of 1934 is the date of the testator's death or the date of the event upon which the remainder becomes vested."

The Court then held as follows:

> "This basis is the fair market value of the securities at the time they were distributed by the trustee to the taxpayer, when the interest of the taxpayer therein that, up to that time, had been contingent, became absolute and vested."

That the decisions in the instant cases are in conflict with that of the *Reynolds* case appears clearly in the following statement of the Second Circuit in the case of *Van Vranken v. Helvering,* 115 F. (2d) 709, 710 (December 2, 1940):

> "Were it not for the change in the attitude of the Supreme Court towards the common law distinction between contingent and vested remainders (Helvering v. Hallock, 309 U. S. 106; 60 S. Ct. 444; 84 L. E. 604; 125 A. L. R. 1368), we should therefore find it difficult to escape the force of the reasoning in Reynolds v. Commissioner, supra (114 F. (2d) 804)."

And by the statement of the Second Circuit in the instant cases:

> "This case presents no other questions than those decided in Van Vranken v. Helvering handed down herewith. It is true that here the trusts were not testamentary but had been set up by a deed of the taxpayers' ancestor executed in 1910. The relevant statute is not 113 (a) (5) of the Act of 1934, but 113 (a) (4) of the Act of 1932, and that has remained unchanged from the time of its first enactment in 1921. This might have required some separate consideration if we had depended upon the changes in Section 113 (a) (5) in reaching our conclusion; but we did not. Again there was in 1933 no regulation interpreting Section 113 (a) (4), but that too is not important for we have not depended upon the regulations of 1934 in our reasoning in Van Vranken v. Helvering. Our discussion there can therefore serve here."

We therefore respectfully urge that this Court allow the Writs.

Respectfully submitted,

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THOMAS BURNS DRUM,
CHARLES S. JACOBS,
Attorneys for Petitioners.

BALLARD, SPAHR, ANDREWS & INGERSOLL,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940

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RICHARD ARCHBOLD, PETITIONER

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The questions presented relate to the proper basis, under Section 113 (a) (4) of the Revenue

Act of 1932, for determining gain or loss upon sales made by petitioners in 1933 of securities which they received, on reaching the age of 21, under the provisions of an *inter vivos* trust created before 1921. Two types of securities are involved: (1) securities forming part of the original corpus of the trust, and (2) securities purchased by the *inter vivos* trustees. Section 113 (a) provides that the basis for property shall be cost, except as otherwise provided in its subsections. Subsection 4 of Section 113 (a) provides that the basis for property "acquired by gift or transfer in trust" before 1921 "shall be the fair market value of such property at the time of such acquisition." The Government contends that securities of the first type above enumerated were "acquired" by petitioners when they were transferred to the *inter vivos* trustees, and that securities of the second type, if they fall within subsection (4) at all and are not governed by the general cost provision of Section 113 (a), were "acquired" by petitioners when they were purchased by the trustees. Petitioners contend that they "acquired" all of the securities at the time of delivery to them by the trustees.

Similar questions, involving the basis of property acquired through testamentary trusts, under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936, are awaiting argument before this Court in *Helvering* v. *Reynolds,* 114 F. (2d) 804 (C. C. A. 4th), certiorari granted, No. 684, this Term, and in *Cary* v. *Helvering,* and associated cases, 116 F. (2d)

800 (C. C. A. 2d), certiorari granted, Nos. 734–737, this Term. The provisions of Section 113 (a) (5) of the 1934 and 1936 Acts, dealing with property acquired through testamentary trusts, parallel the provisions of Section 113 (a) (4) of the 1932 Act, dealing with property acquired through an *inter vivos* trust. We therefore do not oppose the granting of writs of certiorari in the present cases.

However, other related questions have already been argued before this Court in *Maguire* v. *Helvering,* No. 346, this Term, and *Helvering* v. *Gambrill,* and associated cases, Nos. 472–475, this Term, and it may be that the decisions in those cases will substantially dispose of the questions in the present cases and in the *Reynolds* and *Cary* cases.

If the outcome of the present cases should depend, contrary to the Government's contention, upon whether the interests of petitioners under the trust were "vested" or "contingent," we wish to reserve the right to contend that the interests were vested rather than contingent.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MARCH, 1941.

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